



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 10**

1200 Sixth Avenue, Suite 155  
Seattle, WA 98101

OFFICE OF THE REGIONAL  
ADMINISTRATOR

November 21, 2022

Re: Formal Dispute Resolution Decision regarding the Administrative Settlement Agreement and Order on Consent for Remedial Design at the Swan Island Basin Project Area, CERCLA Docket Number 10-2021-001

Dear Representatives of Daimler Truck North America LLC, Vigor Industrial LLC, Cascade General, Inc., Shipyard Commerce Center LLC, and EPA Region 10 Superfund and Emergency Management Division:

This letter addresses the dispute raised to me through the formal dispute resolution process of the Administrative Settlement Agreement and Order on Consent for Remedial Design at the Swan Island Basin Project Area (Settlement). The Respondents in the settlement, Daimler Truck North America LLC, Vigor Industrial LLC, Cascade General, Inc., and Shipyard Commerce Center LLC (Respondents) submitted a statement of position and a request for a meeting with me regarding the dispute dated July 12, 2022. The U.S. Environmental Protection Agency Region 10 Superfund and Emergency Management Division (SEMD) provided a written statement of position regarding the dispute dated September 15, 2022. The primary issues raised by Respondents are that costs incurred prior to September 1, 2020 are not within the definition of "Future Response Costs" and therefore should not be included in the bill issued to Respondents and that certain costs charged to the 10TC account are not all attributable to site-wide costs and therefore should not be included in the bill issued to Respondents. Furthermore, Respondents requested my decision on whether to include a requirement for SEMD to provide more detailed cost reports and details with future bills. In response, SEMD stated that costs incurred prior to September 1, 2020 are within the definition of "Future Response Costs" and were appropriately billed to Respondents and that all costs charged to the 10TC account are site-wide costs and therefore were appropriately billed to Respondents. On September 26, 2022, Respondents submitted an objection to SEMD's written statement stating that it was untimely. I will address that objection below.

I held a meeting on September 28, 2022 to provide an opportunity for Respondents to deliver further input on the disputed matters and to provide me with the opportunity to ask clarifying questions of Respondents and SEMD. I greatly appreciate everyone's time and preparation for the meeting, as well as the work put in by all parties in preparing written statements and supporting documentation for my consideration. My decision on these disputed issues is as follows: the Respondents and SEMD had different understandings of the negotiated agreement in the Settlement regarding costs paid or incurred prior to September 1, 2020 and therefore Respondents will pay half of the costs disputed attributable to the September 1, 2020 matter; all costs charged to the 10TC account are attributable to site-wide costs and therefore Respondents will pay all 10TC costs; and SEMD will continue to provide the same level of detail regarding bills as it has in the past in accordance with the Settlement requirements. I will now provide details on each of my decisions, including the objection raised by Respondents on September 26, 2022.

## **Response to Respondents' September 26, 2022 Objection**

An attorney for Daimler Truck North America LLC and Vigor Industrial LLC submitted an objection to the EPA attorney advising me in this dispute requesting that SEMD's written statement "be excluded from and not be considered by [me] in this Formal Dispute Proceeding" because it was submitted late which they state, "is fundamentally unfair and prejudicial to the interests of the Performing Parties."

The request was based on their reading of Paragraph 48 of the Settlement which states:

"...Respondents shall, within 20 days after the end of the Negotiation Period, submit a statement of position to EPA. At or about the time Respondents submit their statement of position initiating formal dispute resolution, Respondents may meet with the Regional Administrator, EPA Region 10... EPA may, within 20 days thereafter, submit a statement of position."

I find the language of Paragraph 48 to be unclear regarding the timeline. The final sentence regarding the 20-day window for EPA to submit its statement of position uses the word "thereafter" but it does not specify what triggering event "thereafter" refers to. I believe a reasonable person could read this paragraph and believe SEMD had 20 days after the Respondents' written submission, or 20 days after the Respondents' request for a meeting with me, or 20 days after the meeting with me, to submit its written statement. Given that the language of Paragraph 48 is unclear, I cannot agree with Daimler Truck North America LLC and Vigor Industrial LLC to exclude SEMD's written statement.

Furthermore, the purpose of formal dispute resolution is for me to hear both sides of the issues and to be informed by all parties prior to making a decision. If I were to exclude SEMD's written statement, I would essentially only be reviewing one side of the dispute. I believe such an exclusion would be out of line with the intent of the dispute resolution process of the Settlement. Daimler Truck North America LLC and Vigor Industrial LLC state in their objection that the timing of SEMD's writing submission is "fundamentally unfair and prejudicial", however I fail to see any support for this claim. The meeting with me, and my review of written statements, is not a trial where parties submit motions and responses and have the opportunity for oral arguments in front of a judge, thus requiring advance notice and review of the opposing parties' submittals. As described in the Settlement, my role is to review written statements from both Respondents and SEMD, and to meet with Respondents if requested, prior to reaching my decision. It is fair, equitable, and appropriate for me to consider SEMD's written statement and I have done so in reaching my decisions on the matters raised in this dispute.

## **Costs Paid or Incurred Prior to September 1, 2020**

Respondents argue no costs incurred prior to September 1, 2020 should have been included in the bill from SEMD, regardless of when SEMD had to pay an invoice for such costs. SEMD argues that including costs in the bill for invoices received after September 1, 2020, regardless of when its contractors undertook the work, is appropriate and in line with the negotiated language of the Settlement. It became clear to me through reviewing the written submittals and through listening to responses to my questions during the meeting on September 28, 2022, that Respondents and SEMD have a different interpretation of the definition of "EPA Future Response Costs" in Paragraph 10 of the Settlement. It appears to me that through negotiations and drafting, the parties came away with a different understanding of the language and had different intent of what would and would not be included in bills from SEMD. The result was a final Settlement that did not reflect or clearly define the intent of either party.

The Settlement defines “EPA Future Response Costs” as including

“...direct and indirect costs paid or incurred by EPA, prior to the Effective Date, in connection with negotiating this Settlement and charged to account 10SW beginning on September 15, 2020, and account 10TC beginning on September 1, 2020.”

Respondents focused on the word “incurred” after September 1, 2020, whereas SEMD focused on the word “paid” after September 1. I can see the validity of both interpretations. If the intent had been, as Respondents argue, to limit the definition to costs incurred with a clear cut off date of September 1, then it does not make sense for Respondents to have agreed to the word “paid” in the sentence. However, if the intent had been, as SEMD argues, to include contractor costs for work done prior to September 1, 2020, knowing that SEMD would pay the bill after September 1, then it does not make sense for SEMD to agree to the September 1 date as a limiting factor. I could provide suggestions for ways in which the definition could or should have been drafted to ensure all parties were actually in agreement on the terms of the Settlement, but I do not think that would be particularly helpful to this dispute. What I have is the language of the Settlement, and the intent of that language as described by Respondents and SEMD. While it is challenging to determine the intent of the parties at the time the Settlement was negotiated and finalized, it is clear to me that both parties had different intents and expectations for the “paid or incurred” language and the impact of the September 1, 2020 date. It is reasonable for SEMD to include costs associated with initiating the contract, negotiating this Settlement, and other sitewide start-up costs for this large Superfund Site in this Settlement. If the language in this Settlement had been more clear, and both parties were able to show that they had a shared understanding of the intent of the language, my decision likely would have been different.

In its statement, SEMD argues that out of fairness, all potentially responsible parties (PRPs) throughout the Portland Harbor Superfund Site must pay their fair share of the 10TC costs. I agree with this statement. However, comparing Respondents at the Swan Island Basin Project Area to other PRPs is not a useful method for determining how this dispute should be resolved. Each PRP or PRP group reached unique settlements with EPA and the language and intent of those settlements is not disputed here. Instead, as stated above, I am looking at the language of this Settlement and the intent of that language as described by Respondents and SEMD. The language of this Settlement does not clearly align with the intent of the parties, and it is clear to me that the parties were not in agreement about the definition of “EPA Future Response Costs” even though they signed the Settlement. As a result of this vague drafting, I believe Respondents and SEMD should both bear the burden of costs disputed on the grounds of this definition and therefore the disputed costs should be split.

Contractor invoices numbers 1 through 3 have periods of performance prior to September 1, 2020. The total cost of those invoices is \$213,796.47, which was divided amongst the 17 PRP groups in bills sent in accordance with settlements with each of those groups. Respondents must pay 50% of their 1/17<sup>th</sup> portion for invoices numbers 1 through 3, along with any appropriate indirect costs. Based on the information in front of me, I estimate the 1/17<sup>th</sup> share of the total cost for the three invoices as \$12,576.26, and 50% of that total is \$6,288.13. SEMD will prepare a revised bill to address these three invoices in accordance with this decision. Respondent must pay the revised bill in accordance with Paragraph 41 of the Settlement. Contractor invoice number 4 has a period of performance from August 23, 2020 through September 26, 2020. Only 7 days of that invoice occur prior to September 1, 2020 and I find that such a short time period would likely have a minimal impact on the bill, and so this invoice is not included as part of this portion of my dispute resolution response. I will address and include a

decision on contractor invoice number 4 as part of the 10TC decision below. For future billing cycles, I expect this issue to be fully resolved as SEMD should no longer need to include any costs for contractor performance periods prior to September 1, 2020. In the event that SEMD does receive and pay for additional invoices that include work done prior to September 1, 2020, SEMD will not bill Respondents for any of those additional costs for any work done prior to September 1, 2020.

## **10TC Account**

Respondents argue that based on the cost documentation provided by SEMD with the bill dated April 15, 2022 and additional documentation provided in writing on July 11, 2022 and throughout the informal dispute resolution process, that they cannot determine whether costs charged to the 10TC account were actually sitewide costs and therefore cannot determine whether such costs fall within the definition of “EPA Future Response Costs”. Respondents particularly call out certain community involvement costs and costs titled as Cathedral Park. Respondents provided me with a detailed review of SEMD’s contractor invoices using a color-coded system to represent their interpretation of whether certain costs were sitewide. Respondents further assumed that EPA staff time was inaccurately charged to 10TC and proposed a percentage of incorrect account charging based solely on their color-coded interpretation of contractor invoices. SEMD responded to this claim, both in its written statement and during the September 28, 2022 meeting, with details on different tasks, including those labelled as Cathedral Park, and how such activities were in fact related to all Portland Harbor remedial design activities and processes and therefore were accurately charged to the 10TC account. SEMD further stated that all EPA staff attest to the accuracy of their timecards and there is no reason to believe EPA staff are inaccurately charging time to the 10TC account.

I find that Respondents claims relating to the 10TC account, which includes contractor invoices 4 through 17 and EPA staff time, do not have merit. I have reviewed the written submissions and supporting documentation, with special attention to the task order descriptions, considered the work needed to support the entire Portland Harbor Superfund Site, and listened to input from all parties. The costs charged to the 10TC account appear to be consistent with the definition of “EPA Future Response Costs” and are not inconsistent with the requirements of the NCP as required by Section 107(a) of CERCLA. Regarding Cathedral Park specifically, it appears to me that Respondents believed the costs were not sitewide based on the name assigned and perceived lack of communication or notification from SEMD on the purpose of the Cathedral Park community involvement activities. SEMD was able to further describe those costs and I am convinced the name was based on the location of the activities but not based on the substance or purpose of those activities. I agree with SEMD that the costs charged to 10TC are all sitewide costs.

The Portland Harbor Superfund Site is a complex site and I understand SEMD’s interest in efficiency and keeping costs down for all parties, including Respondents, by creating the 10TC sitewide account. Considering the complexity and potential programmatic and accounting costs associated with a remedial design supported by 17 individual PRP groups, I believe it is SEMD’s intent to manage these costs as efficiently and judiciously as possible. I understand this is common practice throughout EPA across the country. That being said, I think there is room for better communication by SEMD to detail and explain sitewide work to Respondents. It is important for Respondents to understand the costs billed to them, and to understand the costs in advance of receiving a bill. I think SEMD and Respondents worked on that conversation and understanding as part of the Settlement negotiations, and that communication

needs to be ongoing. I am asking SEMD to be more proactive on communicating its sitewide activities to Respondents as a method of preventing future disputes over billing.

In sum, Respondents will pay all costs associated with their share of contractor invoices 4 through 17 as well as all EPA staff time charged to the 10TC account and all appropriate indirect rates and other costs included in the bill dated April 14, 2022. Respondents must make this payment in accordance with the timeline and process described in Paragraphs 41 through 43 of the Settlement.

### **Request for Detailed Cost Documentation**

Respondents requested, as relief in this dispute, a requirement that SEMD provide more detailed cost documentation and payroll explanations with future bills than what was provided with the disputed bill. SEMD responded saying that it had provided Respondents with a standard bill, and supporting documentation, in accordance with standard practice and with the terms of the Settlement. The Settlement clearly states the standard and expectation for documentation in Paragraph 41.a.:

“EPA will send Respondent a bill or bills requiring payment of EPA Future Response Costs that includes a SCORPIOS Report or similar EPA prepared cost summary report, which includes direct and indirect costs incurred by EPA, its contractors, its subcontractors, and the United States Department of Justice.”

Based on the information provided to me in this dispute, the language of the Settlement is not under dispute. It appears to me that Respondents and SEMD have an understanding of the requirements and expectations set by Paragraph 41.a. of the Settlement. Furthermore, when Respondents asked EPA for further documentation and explanation of the disputed bill, EPA responded with a letter and detailed contractor invoices, dated July 11, 2022, and set up a meeting to further explain the bill. In our meeting on September 28, 2022, I specifically asked Respondents whether they thought SEMD met the requirements of the Settlement regarding documentation of the bill and Respondents did not directly answer my question. Respondents stated then, and through the written statement, that more detailed explanations are being requested and would be helpful for them to understand the bill.

I fully understand Respondents’ interest in receiving more detailed information regarding billing in the future. However, I find that SEMD met the requirements of the Settlement by sending the SCORPIOS Report with the bill, dated April 15, 2022. SEMD was consistent with billing practices nationwide and consistent with the requirements of the Settlement. As I stated above in my decision regarding the 10TC account, I think it is important to highlight the roll of communication here. It is important for SEMD and Respondents to keep the lines of communication open regarding billing and for SEMD to be transparent regarding sitewide costs. SEMD should be prepared to provide additional cost documentation when requested, however I will not go so far as to change the terms and requirements of billing documentation in the Settlement. Billing documentation and open communication are distinct, though related, matters. It is my hope that through both the informal and formal dispute resolution process that communication on this bill has increased and Respondents are gaining a better understanding of what to expect for future billing cycles. Therefore, SEMD should continue its standard practice for billing at this Site, in accordance with the Settlement, and Respondents are welcome to raise questions about billing to SEMD should the need arise in the future.

### **Conclusion**

My final decision on this dispute is described in detail above. As I stated at the outset, I considered all written statements from Respondents and SEMD, as well as verbal statements made during our meeting on September 28, 2022. In sum, my decisions are: SEMD must recalculate a bill for Respondents to address contractor invoices numbers 1 through 3, providing a 50% discount to Respondents' share of those invoices; Respondents will pay all other costs billed under the 10TC account to include contractor invoices 4-17, EPA staff time, and all other costs not addressed under the first item; and SEMD will continue to bill Respondents, and provide documentation, in accordance with standard practice and the existing terms of the Settlement. In accordance with Paragraph 41 of the Settlement, Respondents must pay the bill to be generated by SEMD for the recalculation of contractor invoices numbers 1 through 3 within 30 days after receipt of the bill. In accordance with Paragraph 43 of the Settlement, Respondents must make payment to EPA of the remaining sums due for the 10TC account, plus interest, within 5 days after resolution of the dispute. SEMD may also calculate stipulated penalties, as appropriate, pursuant to Section XVI of the Settlement.

This decision is specific to the Administrative Settlement Agreement and Order on Consent for Remedial Design at the Swan Island Basin Project Area, CERCLA Docket Number 10-2021-001, and to the specific dispute raised by Respondents in their written statement dated July 12, 2022. In accordance with Paragraph 48 of the Settlement, this decision is incorporated into and is an enforceable part of the Settlement. Respondents are required to fulfill the requirement described above in accordance with my decision.

Sincerely,

Casey Sixkiller  
Regional Administrator  
U.S. Environmental Protection Agency, Region 10